BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD SCOTT COHEELY	)	
Claimant	)	
	)	
VS.	)	
	)	
ENERGY CENTER	)	
Respondent	)	Docket No. 225,598
	)	
AND	)	
	)	
KANSAS BLDG. INDUSTRY WCF	)	
Insurance Carrier	)	

RICHARD SCOTT COHEELY	)	
Claimant	)	
	)	
VS.	)	
	)	
451 PROTECTION	)	
Respondent	)	Docket No. 245,564
	)	
AND	)	
	)	
COMMERCIAL UNION INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent, Energy Center, and its insurance carrier, Kansas Building Industry Workers Compensation Fund appealed Administrative Law Judge Bryce D. Benedict's Award dated April 27, 2001. The Board heard oral argument on November 13, 2001.

APPEARANCES

Claimant appeared by his attorney, Jeff K. Cooper of Topeka, Kansas. Respondent, Energy Center, and its insurance carrier, Kansas Building Industry Workers Compensation

Fund appeared by their attorney, Matthew Crowley of Topeka, Kansas. Respondent, 451 Protection, and its insurance carrier, Commercial Union Insurance Company, appeared by their attorney, Christopher J. McCurdy of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) entered an Agreed Order to Consolidate on November 6, 2000, which consolidated the claimant's claims in Docket No. 245,564 and Docket No. 225,598.

Docket No. 225,598 is a claim for back injuries suffered in a fall from a gurney in the emergency room on August 1, 1997, where claimant was receiving treatment for inhalation of hydrochloric acid fumes. The respondent for this claim is the Energy Center. The ALJ awarded claimant a 10 percent permanent partial general body functional impairment as a result of this injury.

Docket No. 245,564 is a claim for a back injury suffered in a fall down some stairs on June 10, 1999. The respondent for this claim is 451 Protection. The ALJ awarded claimant a work disability of 42.5 percent based on a 36 percent task loss and a 49 percent wage loss as a result of this injury. The ALJ reduced the award 10 percent for the preexisting functional impairment awarded in Docket No. 225,598.

The respondent, Energy Center, and its insurance carrier raised the following issues on review: (1) whether claimant's accidental injury arose out of and in the course of employment with the respondent for the fume exposure; (2) whether the claimant gave proper notice of the alleged back injury; (3) whether there was an employer/employee relationship between claimant and respondent; (4) nature and extent of claimant's disability, if any; and, (5) whether the respondent is entitled to a credit and/or reimbursement for an overpayment of temporary total disability compensation made under the preliminary order.

The respondent, 451 Protection, and its insurance carrier raised the following issues on review: (1) whether the claimant sustained any personal injury by accident on June 10, 1999; (2) nature and extent of claimant's disability, if any; and, (3) whether the respondent and insurance carrier are entitled to a credit against any award pursuant to K.S.A. 44-510a and/or K.S.A. 44-501(c).

The sole issue raised on review by the claimant is the nature and extent of claimant's disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's award contains a detailed and concise recitation of the facts surrounding each of the accidents claimant suffered. It would serve no useful purpose to reiterate those findings and they are adopted and incorporated herein as if specifically set forth in this Order to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

Docket No. 225,598

Respondent, Energy Center, and its insurance carrier Kansas Building Industry Workers Compensation Fund (hereinafter, Energy Center) argue claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment on August 1, 1997, because his symptoms from the admitted exposure to hydrochloric acid were not contemporaneous with the exposure. Moreover, they argue that when he sought treatment at the emergency room he had been terminated from employment and was no longer respondent's employee.

It is undisputed that some hydrochloric acid was spilled in the basement storage area of his employer Energy Center's business and claimant was directed to clean it up. Claimant began to contain the spill and inhaled the fumes for a few minutes until a co-employee brought him a respirator to wear as he completed the cleanup. When the claimant first experienced an onset of symptoms related to the exposure is disputed. But it is undisputed that later that afternoon claimant called Energy Center and talked to a salesperson because the co-owner of Energy Center would not talk to him. The co-owner was aware that during this telephone conversation claimant stated he was having breathing difficulties and needed to go to the hospital for medical treatment.

After he was exposed to the fumes and before he sought treatment at the emergency room, claimant was terminated from employment for insubordination after an argument with the Energy Center's co-owner. When claimant turned in his keys and uniforms later that afternoon, a further argument led to claimant being escorted from Energy Center's premises by a law enforcement officer.

When claimant sought emergency room medical treatment later that same afternoon, he advised emergency room personnel he had been exposed to the fumes.

Lastly, it is uncontroverted that while in the emergency room claimant fell from a gurney to the floor and had an immediate onset of back pain.

Energy Center argues that claimant should have experienced an immediate onset of symptoms if he had inhaled the fumes. Because he did not seek treatment until late that same afternoon respondent argues any symptoms claimant might have been experiencing were either feigned or not related to the work incident.

Dr. Chris Fevurly, at the respondent's request, reviewed the emergency room records from claimant's visit and opined that it was medically unlikely that claimant's symptoms at the emergency room were the result of the inhalation of hydrochloric acid. Dr. Fevurly opined that the symptoms would have been more contemporaneous with the exposure. But Dr. Fevurly agreed that it was normal for a person exposed to chemicals to be susceptible to suggestion and develop symptoms from anxiety and fear. Moreover, under such a fact scenario the doctor agreed it would be reasonable for that person to seek medical treatment. Dr. Fevurly further noted the emergency room records indicated claimant attributed his breathing problems to the exposure to fumes earlier that day.

Dr. Fevurly testified:

> Q. If a person is exposed to hydrochloric acid and develops the chest tightness, the shortness of breath that they in their minds attribute to exposure to hydrochloric acid or any chemical for that matter, would you think it would be reasonable treatment to go to the hospital and get that checked out, Doctor?
>
> A. Yes.
>
> Q. I assume you probably see a lot of people who think that they've been exposed to chemical, and then when you get in there and check them out and calm them down and reassure them, they really don't have any symptoms that are directly attributable to the chemical exposure, correct?
>
> A. I think that's a fairly common experience between those of us who deal with this on a regular basis. Fortunately, we don't see a lot of - - I can't say that every day we see somebody who has an inhalation exposure, but it is at least once or twice a week.[1]

While employed by Energy Center, claimant was exposed to hydrochloric acid fumes. There is no dispute that at the time claimant suffered the exposure there was an employee and employer relationship between claimant and Energy Center. When he was admitted at the emergency room he was experiencing hyperventilation and he attributed his breathing problems to the exposure to the fumes earlier that day. Medical treatment

[1] Fevurly Depo. at 36-37.

was reasonably required to determine whether he suffered any injury because of the inhalation of fumes at work. The Board concludes, under the facts of this case, that claimant had appropriately sought treatment for breathing difficulties that he attributed to his exposure to hydrochloric acid fumes while an employee of Energy Center.

While receiving treatment for the exposure to the hydrochloric acid fumes, the claimant fell from a gurney and injured his back. The back injury resulted from the treatment claimant was receiving for the work-related accident and is compensable.[2]

Respondent further argues it did not receive timely notice of the claim for a back injury. The back injury flowed from treatment claimant was receiving for his exposure to fumes. As such, the back condition was a natural and probable consequence of the original work-related inhalation of fumes. Therefore, because claimant had provided timely notice of his symptoms from that accident, he was not required to give additional notice under K.S.A. 44-520 and K.S.A. 44-520a in order to have his claim for the back considered.[3]

Three medical opinions were offered regarding the claimant's functional impairment percentage attributable to his back injury suffered in the fall from the gurney. Dr. Sergio Delgado examined claimant on December 8, 1999, at the request of his attorney. Dr. Delgado rated the claimant using the AMA *Guides*,[4] DRE lumbosacral Category III, assigning the claimant a 10 percent whole person impairment. Dr. Delgado further opined that 90 percent of that rating was caused by claimant's fall from the gurney.

The ALJ ordered an independent medical examination of claimant be conducted by Dr. C. Erik Nye. Dr. Nye assigned claimant a 10 percent whole body permanent impairment in accordance with the AMA *Guides*, DRE lumbosacral Category III. Dr. Nye attributed 5 percent of the impairment to claimant's fall from the hospital gurney and 5 percent to the June 10, 1999 accident.

Dr. Jeffrey T. MacMillan examined claimant on January 19, 2001, at the request of respondent, 451 Protection. Dr. MacMillan opined that claimant would fit the AMA *Guides*, DRE lumbosacral Category II which would be a 5 percent whole person impairment. But Dr. MacMillan concluded the impairment was not attributable to the fall from the hospital gurney.

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[2] *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990).

[3] *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, 995 P.2d 855 (2000).

[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (4th ed.)*

The Board finds the opinion of Dr. Nye, the court ordered independent medical examiner, the most persuasive and finds claimant has suffered a 5 percent permanent partial whole body impairment.

The claimant argues he is entitled to a work disability. The ALJ denied claimant any work disability because of his termination for insubordination. The claimant engaged in an argument with respondent's co-owner and as the exchange became more heated the claimant contended certain fireplace equipment had been installed in violation of building code. When requested to identify where such equipment had been installed the claimant refused. Claimant was then terminated for refusal to provide the information and insubordination. Such a termination is tantamount to a refusal to work.

The Board affirms the ALJ's denial of work disability benefits based on the nature of claimant's termination from employment. In cases involving entitlement to work disability benefits, a claimant must establish a nexus between his or her injury and his or her wage loss.[5] Essentially, respondent has a valid defense against liability for work disability benefits because the evidence establishes that claimant's wage loss is related, not to his disability, but to his bad faith.[6] K.S.A. 44-510e(a) prohibits work disability compensation if a claimant is earning 90 percent or more of his or her average gross weekly wage computed as of the date of accident. The Kansas appellate courts, beginning with *Foulk*[7] bar a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his or her pre-injury wage at a job within his or her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[8] The Court has held that some violations of company policies and procedures mandate invocation of the principles set forth in *Foulk*.[9] However, not all violations do so.[10] As previously noted, claimant's insubordination was tantamount to a refusal to work.

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[5] *Hernandez v. Monfort, Inc.*,___ Kan. App. 2d ___, 41 P.3d 886, rev. denied ___ Kan. ___ (2002).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

[8] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

[9] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied 267 Kan. 889 (1999).

[10] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P. 2d 1246 (1999).

In summation, the Board modifies the ALJ's Award in Docket No. 225,598 to find claimant suffered a 5 percent permanent partial general body disability and affirms in all other respects.

Docket No. 245,564

Respondent, 451 Protection, does not dispute claimant suffered an accident while working on June 10, 1999. Instead, it argues claimant did not suffer any personal injury as a result of his fall on the stairway. However, both Drs. Delgado and Nye attributed a portion of claimant's permanent impairment to the accident he suffered on June 10, 1999. When claimant returned to work after his fall from the hospital gurney, he testified his back condition was improving until the fall on June 10, 1999, and then his symptoms worsened. Dr. Nye, the court ordered independent medical examiner, noted in his report: "He [claimant] originally had an injury in 1995 and then he fell off a gurney August 1, 1997 and then had another injury, which he feels was the worse injury on June 10, 1999 while working for 451 Protection carrying a fire suppression cylinder when he fell down some steps and the cylinder landed on his stomach."

The Board concludes the claimant has met his burden of proof to establish that he suffered personal injury by accident arising out of and in the course of his employment on June 10, 1999, when he fell down the stairway.

The ALJ concluded claimant had not suffered any additional functional impairment attributable to the fall on June 10, 1999. Respondent, 451 Protection, argues the Board should affirm that finding. The Board disagrees.

As previously noted in Docket No. 225,598, supra, both Drs. Delgado and Nye concluded that a portion of claimant's current functional impairment was attributable to his fall on June 10, 1999. The claimant advised Dr. Nye that the stairway fall was the more significant injury. For the reasons previously mentioned, the Board concludes, based on Dr. Nye's opinion, claimant suffered an additional 5 percent permanent partial whole body disability as a result of the fall on June 10, 1999.

Respondent, 451 Protection, next argues claimant is not entitled to a work disability because Dr. MacMillan concluded claimant's fall on June 10, 1999, was not the cause for his permanent impairment or restrictions. Nonetheless, Dr. MacMillan did impose permanent restrictions as did Dr. Delgado. Because the Board has concluded that the June 10, 1999, accident did cause additional permanent impairment and was the cause for imposition of permanent restrictions, the claimant is entitled to a work disability. It should also be noted claimant did not have permanent restrictions imposed until after the June 10, 1999, injury.

Because claimant's injuries comprise an "unscheduled" injury, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[11] and *Copeland*.[12] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[13]

The ALJ concluded claimant had not made a good faith effort to find employment. Claimant had not worked since the June 10, 1999, accident. Claimant had not sought unemployment benefits. Claimant sold antiques on the internet as well as spent six weeks in Alabama transporting a family friend to medical appointments. Although claimant provided a list of prospective employers he had contacted, some contacts were apparently made by telephone while claimant was in Alabama and all were limited to the town of Manhattan. In addition, the list contained numerous repeat contacts with the same employers. The Board adopts the ALJ's finding that claimant's attempts at re-employment were cursory and not indicative of a good faith effort.

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277.

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306.

[13] Id. at 320.

Monty Longacre, a vocational rehabilitation counselor, opined claimant retained the ability to earn $6 an hour in the open labor market. Dick Santner, a vocational rehabilitation consultant, opined claimant retained the ability to earn $8 an hour in the open labor market. The Board will impute a wage of $7 an hour for an average weekly wage of $280. This results in a 31 percent wage loss.

Mr. Longacre met with claimant and produced a list of 42 tasks claimant had performed during the 15-year period preceding his June 10, 1999 accident. Dr. Delgado concluded claimant had lost the ability to perform 27 of the 42 tasks for a 64 percent task loss.

Mr. Santner met with claimant and produced a list of 55 tasks claimant had performed during the 15-year period preceding his June 10, 1999, accident. Dr. MacMillan opined claimant had lost the ability to perform 13 of the 55 tasks for a 24 percent task loss.

Although the ALJ discusses the fact that claimant had lost the ability to perform some of the tasks prior to the June 10, 1999 accident, it must again be noted that no permanent restrictions were placed on claimant until after the June 10, 1999, accident. The Board is not unmindful that Dr. Delgado opined he would have imposed the same restrictions on claimant after his back injury from the fall from the hospital gurney. However, no restrictions had been imposed and it cannot be stated claimant had lost any tasks until after the second accident. This is demonstrated by the claimant's ability to perform tasks that exceeded Drs. Delgado and MacMillan's later restrictions in the jobs he performed after he was terminated at the Energy Center. Accordingly, the Board accords some weight to both doctors' opinions regarding task loss and concludes claimant has suffered a 44 percent task loss.

A 31 percent wage loss and a 44 percent task loss compute to a 37.5 percent work disability. Pursuant to K.S.A. 44-501(c) the 37.5 percent work disability is reduced by the 5 percent preexisting functional impairment and claimant is awarded a 32.5 percent work disability.

Lastly, respondent, 451 Protection, argues it is entitled to a credit pursuant to K.S.A. 44-510a. Under K.S.A. 44-510a awards are offset when there are overlapping weeks of permanent partial general disability benefits payable from two compensable accidents and the earlier disability contributes to the overall disability created by the later injury. Under the facts of this case, the respondent has failed to prove there are any weeks of permanent partial general disability benefits from an earlier work-related accident that overlap with the weeks of permanent partial general disability due claimant because of the June 10, 1999, back injury. Accordingly, this award cannot be reduced under K.S.A. 44-510a.

In summation, the Board modifies the ALJ's findings in Docket No. 245,564 and finds claimant suffered a 5 percent permanent partial impairment of function; suffered a 31 percent wage loss, a 44 percent task loss and a 5 percent preexisting functional

impairment. The Board affirms, based on the foregoing analysis and findings, the ALJ's 32.5 percent work disability award.

AWARD

Docket No. 225,598

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 27, 2001, is modified to reflect claimant suffered a 5 percent permanent partial disability to the whole body.

The claimant is entitled to 2 weeks temporary total disability compensation at the rate of $351 per week or $702 followed by 20.75 weeks at $351 per week or $7,283.25 for a 5 percent permanent partial general bodily disability making a total award of $7,985.25 which is all due and owing less amounts previously paid.

The award is affirmed in all other respects.

AWARD

Docket No. 245,564

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 27, 2001, is modified in accordance with the foregoing findings but affirmed as to the finding of a 32.5 percent work disability and in all other respects.

IT IS SO ORDERED.

Dated this _____ day of October 2002.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Matthew Crowley, Attorney for Respondent, Energy Center
Christopher J. McCurdy, Attorney for Respondent, 451 Protection
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation